(25)
FILED
NOV 1 1993
OFFICE OF THE CLERK

No. 92-780

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

v.

JOSEPH M. SCHEIDLER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONERS

Of Counsel:

LOWELL E. SACHNOFF
JACK L. BLOCK
SACHNOFF & WEAVER, LTD.
30 South Wacker Drive
Suite 2900
Chicago, Illinois 60606
(312) 207-1000

ALAN M. POLLACK
MITCHELL G. MANDELL
SCOTT A. SOMMER
POLLACK & GREENE
757 Third Avenue
New York, New York 10017
(212) 421-5300

FAY CLAYTON
Counsel of Record
SUSAN VALENTINE
JUDI A. LAMBLE
ROBINSON CURLEY & CLAYTON, P.C.
300 South Wacker Drive
Suite 1700
Chicago, Illinois 60606
(312) 663-3100

Counsel for the Petitioners

PETITION FOR CERTIORARI FILED NOVEMBER 2, 1992
CERTIORARI GRANTED JUNE 14, 1993

BEST AVAILABLE COPY

3 RP

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		iii
I.	RESPONDENTS FAIL TO FIND AN ECONOMIC MOTIVE REQUIREMENT IN RICO	1
A.	Respondents Cannot Avoid RICO's Plain Language	1
B.	Respondents Search in Vain for an Economic Motive Requirement in RICO	2
C.	Even Respondents' Version of RICO's Legislative History Shows that Congress Did Not Require Economic Motives	5
D.	Respondents' Policy Arguments Have Been Rejected By Congress and This Court	6
E.	Even Respondents Retreat From the Seventh Circuit's Unfounded Economic Motive Requirement	8
II.	THE REQUISITE PREDICATE ACTS ARE PLED	10
A.	Hobbs Act Extortion is Pled	10
	1. Respondents Extorted Petitioners' Property Rights	10

		Page
	2. Respondents Used Force, Violence and Fear	13
B.	Many Predicate Acts Are Encompassed by the Complaint	13
III.	RICO ACCOMMODATES THE FIRST AMENDMENT	14
A.	The Complaint Addresses Criminal Conduct, Not Speech	14
	1. *Claiborne* Governs the First Amendment Issues Here	16
	2. Civil Disobedience is Not Protected Speech	17
B.	Congress Has Resolved Respondents' Policy Arguments	18
IV.	CONCLUSION	20

TABLE OF AUTHORITIES

Cases: **Page**

Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143 (1987) 5

Alexander v. United States, 113 S.Ct. 2766 (1993) 1, 7, 16, 18

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) 9

Bagaric v. United States, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983) 8

Bd. of Regents v. Roth, 408 U.S. 564 (1972) 11

Bray v. Alexandria Women's Health Clinic, 113 S.Ct. 753 (1993) 7, 9, 10, 15

Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519 (1947) 2

Caminetti v. United States, 242 U.S. 470 (1917) 1

Carpenter v. United States, 484 U.S. 19 (1987) 10

Conley v. Gibson, 355 U.S. 41 (1957) 13

Council of Defense v. Int'l Magazine, 267 F. 390 (8th Cir. 1920) 9

Cox v. Louisiana, 379 U.S. 559 (1965) 17

Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) 15

Foman v. Davis, 371 U.S. 178 (1962) 14

Goldberg v. Kelly, 397 U.S. 254 (1970) 11

Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989) 1

Guidry v. Bank of LaPlace, 954 F.2d 278 (5th Cir. 1992) 13

H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989) 1, 2, 3, 4

Hishon v. King & Spalding, 467 U.S. 69 (1984) 14

Holmes v. Sec. Investor Protection Corp., 112 S.Ct. 1311 (1992) 2

Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333 (1977) 9

Leatherman v. Tarrant County Narcotics, 113 S.Ct. 1160 (1993) 16

Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853) 11

McLaughlin v. Anderson, 962 F.2d 187 (2d Cir. 1992) 13

Miranda v. Ponce Fed. Bank, 948 F.2d 41 (1st Cir. 1991) 13

NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 16, 17

NCAA v. Bd. of Regents,
468 U.S. 85 (1984) 9

Northeast Women's Center, Inc. v. McMonagle,
868 F.2d 1342 (3d Cir.), *cert. denied*,
493 U.S. 901 (1989) 16

People ex rel. Short v. Warden of City Prison, 130 N.Y.S. 698 (App. Div. 1911) 13

People v. Ryan, 232 N.Y. 234 (1921) 11

People v. Squillante,
185 N.Y.S.2d 357 (Sup. Ct. 1959) 11

People v. Wisch, 296 N.Y.S.2d 882
(Sup. Ct. 1969) 11

Pinkerton v. United States,
328 U.S. 640 (1946) 10

Reves v. Ernst & Young,
113 S.Ct. 1163 (1993) 7, 16

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 11

Russello v. United States,
464 U.S. 16 (1983) 1

Sedima, S.P.R.L. v. Imrex Co., Inc.,
473 U.S. 479 (1985) 5

Stirone v. United States,
361 U.S. 212 (1960) 10

Summit Health, Ltd. v. Pinhas,
111 S.Ct. 1842 (1991) 9

United Sav. Ass'n v. Timbers of Inwood Forest, 484 U.S. 365 (1988) 1

United States v. Anderson,
716 F.2d 446 (7th Cir. 1983) 13

United States v. Boylan, 620 F.2d 359
(2d Cir.), *cert. denied*, 449 U.S. 833 (1980) 9

United States v. Cerilli, 603 F.2d 415
(3d Cir. 1979), *cert. denied*,
444 U.S. 1043 (1980) 11

United States v. Culbert,
435 U.S. 371 (1978) 6

United States v. Debs, 949 F.2d 199
(6th Cir. 1991), *cert. denied*,
112 S.Ct. 2945 (1992) 12

United States v. Enmons,
410 U.S. 396 (1973) 11

United States v. Frazier, 560 F.2d 884
(8th Cir. 1977), *cert. denied*,
435 U.S. 968 (1978) 12

United States v. Green,
350 U.S. 415 (1956) 12

United States v. Hoelker,
765 F.2d 1422 (9th Cir. 1985),
cert. denied, 475 U.S. 1024 (1986) 13

United States v. Lance,
536 F.2d 1065 (5th Cir. 1976) 12

United States v. Lewis,
797 F.2d 358 (7th Cir. 1986) 12, 13

United States v. Local 560,
780 F.2d 267 (3d Cir. 1985),
cert. denied, 476 U.S. 1140 (1986) 12

United States v. Mitchell,
463 F.2d 187 (8th Cir. 1972),
cert. denied, 410 U.S. 969 (1973) 13

United States v. Nadaline, 471 F.2d
340 (5th Cir.), *cert. denied*,
411 U.S. 951 (1973) 12

United States v. Nardello,
393 U.S. 286 (1969) 12

United States v. Nedley,
255 F.2d 350 (3d Cir. 1958) 11

United States v. Santoni,
585 F.2d 667 (4th Cir. 1978),
cert. denied, 440 U.S. 910 (1979) 12

United States v. Starks,
515 F.2d 112 (3d Cir. 1975) 13

United States v. Tropiano,
418 F.2d 1069 (2d Cir. 1969),
cert. denied, 397 U.S. 1021 (1970) 11, 12

United States v. Turkette,
452 U.S. 576 (1981) 1, 2, 6

United States v. Zemek, 634 F.2d 1159 (9th Cir.), *cert. denied*, 450 U.S. 916 (1981) 12

Webster v. Reproductive Health Services, 492 U.S. 490 (1989) 14

Wilson v. Garcia, 471 U.S. 261 (1985) 6

Wisconsin v. Mitchell, 113 S.Ct. 2194 (1993) 15, 16, 18

Yee v. City of Escondido, 112 S.Ct. 1522 (1992) 10

Constitution, Statutes and Rules:

U.S. Constitution, amend. I 14-20

Sherman Act, 15 U.S.C. 1 *et seq.* (1973) 9

18 U.S.C. § 659 (1976) 14

Hobbs Act, 18 U.S.C. § 1951 (1984) 10, 14

Travel Act, 18 U.S.C. § 1952(a) (Supp. 1993) 14

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (1984) . . . . . *passim*

18 U.S.C. § 1961 . . . . . 3, 4, 12, 19

18 U.S.C. § 1962 . . . . . 4, 7

Fair Labor Standards Act,
29 U.S.C. § 203(r) (Supp. 1993) 3

Organized Crime Control Act of 1970,
Pub. L. 91-452, 84 Stat. 922 . . . . . 2, 3, 6

Fed. R. Civ. P. 8(a) 13

Fed. R. Civ. P. 23 9

U.S. Sup. Ct. Rule 14.1(a) 10

Colo. Rev. Stat. Ann. § 18-3-207
(West 1990) 12

Fla. Stat. Ann. § 836.05 (West 1976) 12

Mass. Gen. Laws Ann. ch. 265,
§ 25 (West 1990) 12

Mich. Comp. Laws Ann. § 750.213 (West 1990) 12

Other Authorities:

Black's Law Dictionary (6th ed. 1990) 11

Lindgren, *More Blackmail Ink: A Critique of Blackmail, Inc., Epstein's Theory of Blackmail*,
16 Conn. L. Rev. 909 (1984) 12

Oxford English Dictionary, Vols. III and XIII
(2d ed. 1989) 2

Pines, *Why U.S. Didn't Use RICO Against Sheik*,
210 N.Y.L.J. 43 (1993) 8

Restatement (Second) of Torts, § 766 (1989) 11

Restatement (Second) of Torts, § 766B (1989) 11

Scheidler, *Closed: 99 Ways to Stop Abortion* (1985) 15

S.Rep. No. 617, 91st Cong., 1st Sess. 41 (1969) 5

5 Wright & Miller, *Federal Practice and Procedures: Civil 2d* § 1216 (1990) 14

115 Cong. Rec. 6,993 (1969) 5

116 Cong. Rec. 846 (1970) 6

116 Cong. Rec. 18,913 (1970) 7

116 Cong. Rec. 18,914 (1970) 6

116 Cong. Rec. 18,940 (1970) 6

116 Cong. Rec. 25,190 (1970) 5

116 Cong. Rec. 35,212 (1970) 19

I. RESPONDENTS FAIL TO FIND AN ECONOMIC MOTIVE REQUIREMENT IN RICO

A. Respondents Cannot Avoid RICO's Plain Language

Despite over 260 pages of briefs, Respondents and their *amici* fail to locate an economic motive requirement in the text of RICO. Instead, they enlist a cacophony of statutory construction rules that ask the Court to ignore the plain language of the statute and engage in "a holistic endeavor" (Scheidler, *et al.* at 9, 22, n.32), examine context and common law background (*id.* at 22, 41; Terry, *et al.* at 16), apply the rule of lenity (Ohio Right to Life Society, Inc., *et al.* at 23), and use statutory construction rules in effect in 1970 (Scheidler at 22-23 n.32).

Yet Respondents do not dispute this Court's long-standing rule that a statutory term must be ambiguous before the Court will resort to secondary methods of interpretation. *United Sav. Ass'n v. Timbers of Inwood Forest*, 484 U.S. 365, 371 (1988) (*ambiguous* provision may be clarified by holistic statutory construction); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 508-09 (1989) (look to legislative history and statute's structure to construe *ambiguous* text); *Russello v. United States*, 464 U.S. 16, 29 (1983) (rule of lenity does not apply to unambiguous RICO provisions); *Caminetti v. United States*, 242 U.S. 470, 485 (1917). *See also* Petitioners' Brief ("P.Br.") at 16-18.

The terms at issue here, "enterprise" and "racketeering activity," are not ambiguous. This Court held as much in *United States v. Turkette*, 452 U.S. 576, 581, 587 n.10 (1981) (no uncertainty in the meaning of "any union or group of individuals associated in fact"), and in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 232 (1989) (noting precise definition of what "racketeering activity" "means"). There is no reason to launch into other methods of statutory construction.[1]

---

[1] The "clear statement rule" does not apply because RICO does not criminalize constitutionally protected speech. *See Alexander v. United States*, 113 S.Ct. 2766, 2768 (1993). *See also* pp. 14-15 *infra*. Although Respondents ask the Court to look beyond RICO's text for elements they say are "implicit" in

B. Respondents Search In Vain for an Economic Motive Requirement in RICO

Looking to RICO's title, findings, definitions, substantive provisions and remedies, Respondents search in vain for evidence of an economic motive requirement. Nothing in the title suggests it. Respondents' torture of the meanings of "racketeer" and "corrupt" cannot convert these words into economic terms that limit RICO's scope.[2] Moreover, titles do not supersede a statute's plain language. *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947).

The findings prefacing the Organized Crime Control Act of 1970 ("OCCA"), Pub. L. 91-452, 84 Stat. 922, demonstrate Congress's concern with the economic *effects*, not motives, of racketeering. The first and fourth findings refer to the drain of money from the economy and the burden of racketeering on interstate commerce. The second and third show Congress's concern with both the money *and* power that enable racketeers to hurt the national economy. The findings do not reflect the simple focus on ill-gotten gains that Respondents suggest.

Respondents' definitional arguments advance their theory no further. They contend that because "person" is defined to "include" any individual or entity capable of holding an interest in property, RICO must be aimed only at financially-motivated actors. This argument contradicts Respondents' own contention that they -- who indisputably can and do hold interests in

---

the statute, Migliorino at 15, interpretating stated terms does not mean inventing new ones -- a rule this Court has consistently followed with RICO. *Compare Holmes v. Sec. Investor Protection Corp.*, 112 S.Ct. 1311, 1316-17 (1992) (interpreting "by reason of"), and *H.J.*, 492 U.S. at 238-39 (interpreting "pattern"), *with Turkette*, 452 U.S. at 580-81 (refusing to invent "legitimate business" requirement).

[2] Respondents suggest that "racketeer" and "corrupt" involve money and bribery. Scheidler at 13. But the same dictionary Scheidler quotes defines racketeer as "[a] member of a gang or association of criminals practicing extortion, intimidation, violence, and other illegal acts on a large scale...." *Oxford English Dictionary*, Vol. XIII, pp. 81-82 (2d ed. 1989). "Corrupt" is defined first as "depraved, spoiled." *Id.* at Vol. III, pp. 972-73.

property -- are not economically motivated.[3] Scouring definitions of enterprise, Respondents' search for an economic motive requirement fares no better. The notion of "gain" does not pervade the definition of enterprise: an individual and a "group of individuals associated in fact although not a legal entity" are hardly marked by their economic motive.[4] The definition's inclusion of "any" individual or association in fact nullifies the exclusions Respondents advocate. *Contra* Terry at 19-20.[5] The restriction of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203(r) (Supp. 1993), to enterprises that operate "for a common business purpose," *see* Terry at 21, reinforces the breadth of RICO's enterprise definition. The FLSA definition highlights Congress's awareness that "enterprise" does not necessarily imply "business enterprise" and underscores the decision to require that FLSA enterprises -- in contrast to RICO enterprises -- have a "business" purpose. The FLSA comparison also reinforces Petitioners' unrebutted argument that Congress's use of "business enterprise" in certain titles of OCCA, but not in RICO, shows that Congress drafted RICO to reach both financially- and nonfinancially-oriented enterprises. P.Br. at 25-26.

Unable to avoid the precise and unambiguous definition of "racketeering activities" (the statute says "'racketeering activity' means...") and the fact that many of the predicate offenses are,

---

[3] The definition of "person" makes sense not because it calls for *acquiring* property but because it reaches plaintiffs whose business or property can be injured and defendants who can pay damages.

[4] Nor does commerce necessarily flow from the definition of enterprise, *see* P.Br. at 21-22, notwithstanding Terry's hopscotch approach to what he calls "the first *concrete* definition" of the term. Terry at 20 (emphasis in original). RICO's only statutory "commerce" requirement for an enterprise is the jurisdictional requirement that it affect interstate commerce. This is pled. JA-46-48.

[5] Terry incorrectly compares the "includes" of the enterprise definition with the "requires" of the pattern definition. In *H.J.*, 492 U.S. at 236-37, the Court found a need to clarify the definition of "pattern" because, unlike other RICO terms, "pattern" is defined only by what, at a minimum, is required. *Compare* 18 U.S.C. § 1961(4) *with* § 1961(5) (Supp. 1993).

on their face, non-economic crimes, Respondents creatively argue that "the thrust" of the violent offenses is commercial, since they may play an "instrumental role" in the "commercial activity of enterprises." Scheidler at 15. This illogical argument fails because RICO does not require that enterprises engage in "commercial activity" or that the predicate acts play a role in "commercial activity." The phrase "commercial activity" is significantly absent from the statute. The argument that the definition of racketeering activities supports an economic motive requirement flies in the face of § 1961(1), since predicate acts such as murder, arson and obstruction of justice are not inherently economic crimes.

Turning to the substantive provisions of § 1962, Respondents fail to rebut Petitioners' opening argument that § 1962(c) consciously expands the scope of RICO beyond the misconduct addressed by §§ 1962(a) and (b). Sections 1962(a) and (b) do not require an economic motive, but even if they did, § 1962(c) reaches more broadly. P.Br. at 27-29.[6]

Respondents argue that RICO's forfeiture and treble damage provisions prove that Congress intended RICO to apply only to those who profit from their racketeering. While RICO's remedial provisions clearly punish those who profit, there is no indication that these provisions were meant to limit liability. To the contrary, RICO's treble damages provision was designed to remedy economic *injury* and provide an incentive to "bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are

---

[6] Respondents seek support for an economic motive requirement in the phrase "conduct of such enterprise's affairs through a pattern of racketeering activity." They argue that racketeering "activity" means action but "affairs" means either action or commercial business. So that different words have different meanings, they contend that "affairs" must mean commercial business. Their reasoning skips two essential steps. "Racketeering activity" is a defined term; "activity" cannot be construed separately. Since racketeering activity does not mean "action," as they claim, affairs can and should be given its normal meaning, *see H.J.*, 492 U.S. at 238, which, Respondents point out, is "action," and not necessarily commercial business. *Cf.* Scheidler at 16.

deemed inadequate." *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 151 (1987). *See also Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 493 (1985).

C. Even Respondents' Version of RICO's Legislative History Shows that Congress Did Not Require Economic Motives

Respondents' foray through RICO's legislative history only corroborates the absence of an economic motive limitation. As Respondents help demonstrate, Congress was primarily concerned with the economic *effects* (not purposes or motives) of racketeering. *See, e.g.*, Scheidler at 35 n.78 (Title IX seeks to "free the channels of commerce," S.Rep. No. 617, 91st Cong., 1st Sess. 41 (1969) at 81); Migliorino at 40 (RICO is a tool to eradicate the "baneful influence of organized crime in our economic life," 116 Cong. Rec. 25,190 (1970)). The sponsor of S.1623 (a precursor to RICO) observed: "The proper functioning of a free economy requires that economic decisions be made by persons free to exercise their own judgment. Force or fear limits choice, ultimately reduces quality, and increases prices." 115 Cong. Rec. 6,993 (1969).[7]

Respondents also confirm that Congress did not choose to confine RICO to a particular class of criminals. *See, e.g.*, Scheidler at 25-26 (an early version of RICO was aimed at the Mafia, but the bill's sponsor changed that focus); Scheidler at 26-27, 29 (S.2048 and S.2049, RICO precursors, applied to "business enterprises"; when the bills were integrated, the "business" limitation was deleted, as it was from S.1623); Scheidler at 29 (when S.1861 was reported out of committee, white collar crimes were added to extend the bill's reach beyond the Mafia); Scheidler at 35 (in response to criticism from the

---

[7] As Congress might have foreseen, the availability of women's health services has been compromised by PLAN's violence. In the first five months of 1993, arson and vandalism cost clinics $2 million. National Abortion Federation, *et al.* ("NAF") at 7. Doctors and staff have quit their jobs due to harassment, landlords have refused to renew clinics' leases and patients have cancelled appointments out of fear, causing a decrease in revenues. *Id.* at 12, 24.

American Civil Liberties Union ("ACLU"), the bill's sponsor acknowledged that RICO reached offenses committed by persons outside organized crime, 116 Cong. Rec. 18,914, 18,940 (1970). Thus, Respondents concede that even if RICO was prompted by a need to deal with mobsters, Congress abandoned that focus early on and instead aimed the bill at enterprise criminality, which is defined by conduct, not affiliation.[8]

D. Respondents' Policy Arguments Have Been Rejected By Congress and This Court

Respondents and their *amici* contend that without an economic motive requirement, RICO "federalizes" state law crimes in violation of states' rights. This Court soundly rejected that argument over a decade ago. *Turkette*, 452 U.S. at 586-87 ("Congress was well aware that it was entering a new domain of federal involvement" that would alter the federal role in the prosecution of racketeering acts).[9] RICO supplements, rather than restricts the criminal justice systems of the States. *Id.* at 586 n.9; *see also* States of New York, *et al.* ("States") at 3-12.

Respondents argue that unless RICO requires an economic motive, it duplicates other state and federal remedies for "actual violence" and other activities that "offend against the peace." Southern Center for Law & Ethics, *et al.* ("Houser") at 18; People for the Ethical Treatment of Animals ("PETA") at 3-4. There is nothing wrong with a federal statute that provides supplemental or even duplicative remedies for conduct already addressed elsewhere. *Wilson v. Garcia*, 471 U.S. 261, 279

---

[8] Contrary to Scheidler's suggestion at 36-37 and 40 n.98, the legislative histories of Titles X and XI of OCCA do not show an intent to limit RICO to economically motivated enterprises or predicate acts. In declining to limit Title X to offenses listed in Title IX, Senator McClellan said nothing about whether Title IX applies to violent acts committed in the course of "political or social protest." 116 Cong. Rec. 846 (1970). The exclusion of Title XI's "explosive materials" crimes from RICO says nothing about whether RICO reaches non-economic enterprises and acts.

[9] The same argument was rejected as to the Hobbs Act. *United States v. Culbert*, 435 U.S. 371, 379-80 (1978).

(1985) (42 U.S.C. § 1983 was enforceable whether or not it duplicated state remedies). More importantly, RICO provides a unique and necessary tool for prosecutors and private plaintiffs to use against those who "have succeeded in placing themselves above the law." 116 Cong. Rec. 18,913 (1970) (Sen. McClellan). *See* States at 11, *passim.* RICO does not merely punish those who commit predicate offenses, it reaches the decision-makers at the hub of an enterprise controlled or operated through the commission of predicate crimes.[10] *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1170 (1993) (to violate § 1962(c), one must play a part in directing the affairs of the enterprise). RICO provides a remedy, unavailable elsewhere, to the sustained nationwide violence that has been "overwhelming state and local law enforcement." States at 2-3, 8; NAF at 6; *see also Bray v. Alexandria Women's Health Clinic*, 113 S.Ct. 753, 777 (1993) (Stevens, J. *dissenting*).[11] The grave injuries caused and threatened by enterprise criminality also explain why RICO's remedies are not disproportionate to the wrongs it is designed to remedy. *See Alexander v. United States*, 113 S.Ct. 2766, 2776 (1993) (petitioner was convicted not for selling a few obscene materials but for creating and managing "an enormous racketeering enterprise" over a substantial period of time).

---

[10] RICO does not provide treble damages for simple conspiracy, as Houser suggests at 18. It remedies conspiracies to invest in, control, or operate an enterprise through the commission of racketeering crimes -- a complex undertaking that signals ongoing racketeering activities. 18 U.S.C. § 1962 (Supp. 1993). Under Respondents' argument, RICO would exempt all dangerous criminals seeking power rather than cash.

[11] The RICO Case Statement shows multiple arrests of co-conspirators who personally carried out the arson, vandalism, and other acts of force and violence organized by PLAN. Yet PLAN's violence has continued unabated. Between 1977 and July 21, 1993, there were 1380 acts of violence against abortion providers, 287 bomb threats, and 581 clinic blockades. From 1991 through mid-1993, 31 clinics were targets of arson and 220 clinics were vandalized. In the first seven months of 1993, death threats were made to 56 abortion providers; 119 more were stalked by anti-abortion extremists. NAF at 6.

E. Even Respondents Retreat From the Seventh Circuit's Unfounded Economic Motive Requirement

The motive requirement created by the Seventh Circuit so far exceeds similar requirements imposed in the Second and Eighth Circuits that even Respondents retreat from it. The Seventh Circuit required that "*the*" purpose or motive of an enterprise or predicate acts be economic. Petition for *Certiorari* ("Pet.") A-34. Respondents argue, instead, for what they call the "*Ivic/Bagaric*" requirement of some objective economic "dimension" or "goal." Scheidler at 19; Migliorino at 12; *Bagaric v. United States*, 706 F.2d 42, 53 n.11 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983). But unless Respondents concede that a *de minimis* economic dimension suffices, their rule would still create a litigation nightmare in determining how much and what kind of economic dimension is present and required in a given case. P.Br. 38-44.[12]

Under Respondents' "economic dimension" test, and even under the Seventh Circuit's motive requirement, this case should be reversed and remanded. Although Respondents claim that Petitioners allege "no mercenary purpose whatsoever," Terry at 25-26, they do not attempt to rebut the catalog of financial incentives discussed by Petitioners, P.Br. at 46-48, other than to say that those monies flow from donations. Under this logic, RICO would exempt sham 501(c)(3) corporations run by mobsters, as well as publicly-funded government bodies. There

---

[12] Despite their own dispute with the Seventh Circuit, Respondents argue that the economic motive requirement is "settled law" that cannot be overruled without creating retroactive legislation. Scheidler at 9. The square split between the Third and Seventh Circuits on the economic motive issue, the inconsistent scope and application of the requirement in the Second and Eighth, United States at 14, American Medical Association, *et al.* ("AMA") at 15-20, and the absence of such a requirement in other circuits, P.Br. at 36-37, show that there is no "settled law."

The Attorney General's comment that existing federal law could not be relied upon to stop clinic violence was entirely accurate, given the split in the circuits. Federal prosecutors also have been prevented from using RICO in other terrorism cases. *See, e.g.*, Deborah Pines, *Why U.S. Didn't Use RICO Against Sheik*, 210 N.Y.L.J. 43 (1993).

is no express or implied reason to exclude such enterprises and to do so would encourage organized crime to use them.

The predicate acts here are also motivated, at least in part, by Respondents' desire for personal gain. Except Migliorino, Respondents have all risen to paid positions only after committing crimes that subjected them to arrest. Generous contributions at the sites of clinic blockades encourage and reward them. P.Br. at 47 n.40. The more outrageous their acts, the more likely the enterprise is to receive large donations, and the more likely the PLAN member is to be richly compensated. JA-108. There is no doubt that Respondents enjoy a far higher standard of living as a result of their commission of predicate acts for PLAN. For each of these men, the enterprise is their full-time job. It is not credible that they wholly lack an economic motive.[13]

---

[13] Respondents' ancillary "motive" arguments also fail. The antitrust laws support Petitioners, not Respondents, for the Sherman Act, 15 U.S.C. § 1, *et seq.* (1973), does not exempt "political or social protest." Good motives are irrelevant to antitrust liability. *E.g., NCAA v. Bd. of Regents*, 468 U.S. 85, 101 n.23 (1984). *See also Council of Defense v. Int'l Magazine*, 267 F. 390 (8th Cir. 1920) (politically-motivated boycott violated Sherman Act). Contrary to Migliorino's arguments, *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), stressed that a restraint on trade is unlawful if it is designed to have or does have an *effect* on the market or consumers. *Id.* at 500-504. The Complaint here meets even antitrust standards. *See* JA-39-41, 45 (PLAN conspired to force clinics to close beginning in the most concentrated markets). *See also* Pet. at 13-28. *Summit Health, Ltd. v. Pinhas*, 111 S.Ct. 1842, 1846 n.10 (1991), reaffirms Congress's intent not to create exceptions to the Sherman Act. *Contra* Migliorino at 17.

Scheidler's "state of mind" argument ignores settled case law that no criminal intent is required for RICO other than that inherent in the underlying offenses. *E.g., United States v. Boylan*, 620 F.2d 359, 361-62 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980); *see also* Pet. A-32 (no motive requirement under Hobbs Act). Terry's reliance on *Bray* for an implied "purpose" element is misleading: *Bray* construed 42 U.S.C. § 1985(3), which contains an express "purpose" requirement; RICO does *not* contain one.

Respondents also challenge Petitioners' standing, but they ignore three facts: (1) NOW has standing to represent its members, *see Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); (2) this is a class action on behalf of clinics nationwide and representatives need only be adequate and typical of the class, *Fed. R. Civ. P. 23, see also* R.61, 297; and (3) the named

II. THE REQUISITE PREDICATE ACTS ARE PLED

Respondents urge that they have not committed any predicate acts because they have not committed Hobbs Act extortion. This argument, which the Court has declined to review, was rejected by both lower courts, Pet. A-32 n.17, is not properly before the Court, and is not dispositive of the question on which review was granted.[14] Furthermore, forty-five years of case law shows that the Hobbs Act extortion *is* properly pled.

A. Hobbs Act Extortion is Pled

The Hobbs Act, 18 U.S.C. § 1951 (1984), "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence. The Act outlaws such interference 'in any way or degree.'" *Stirone v. United States*, 361 U.S. 212, 215 (1960). Respondents argue that they have not obtained property or used force, violence or fear.

1. Respondents Extorted Petitioners' Property Rights

Respondents argue that the Complaint fails to allege "property" under the Hobbs Act. Terry at 39-40, n.37. While he concedes, as he must, that property need not be tangible, *Carpenter v. United States*, 484 U.S. 19 (1987), he confuses

---

plaintiff clinics were injured by the RICO violations, *e.g.*, JA-41-62 ¶¶ 6, 7, 43-46, 64-78. Contrary to Terry's claims, co-conspirators, unlike mere organizational members, *are* agents of one another, so Terry, like each conspirator, is liable for all the harm caused by the conspiracy. *See Pinkerton v. United States*, 328 U.S. 640 (1946).

[14] U.S. Sup. Ct. R. 14.1(a) provides "only the question set forth in the petition, or fairly included therein, will be considered by the Court." Issues not within the grant of *certiorari* need not be considered. *Bray*, 113 S.Ct. at 765 n.10. Although two Respondents proposed Hobbs Act extortion as an alternative question, the Court declined review on this issue. Respondents' Hobbs Act arguments are not determinative of the issue on which review was granted: whether RICO requires an economic motive. *See Yee v. City of Escondido*, 112 S.Ct. 1522, 1533 (1992) (refusing to address a "related" issue because it would not assist in resolving the question accepted for review).

property with what he calls "abstract" interests. Property is a broad term that includes all rights "protected by the government," *Black's Law Dictionary* 1216-18 (6th ed. 1990). It is a concept that goes back to English law, *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853).[15] Petitioners have pled extortion of *property*, not abstract interests.[16]

Respondents also argue, without authority, that the Hobbs Act "obtaining of property" requirement must be bifurcated into two separate elements, "obtaining" and "property," the first of which they say means "receiving."[17] Extortion does not require

---

[15] Property rights arise whenever rules or understandings "secure certain benefits" and "support claims of entitlement to those benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (relied on in *Carpenter* for the rule that intangible interests subject to the Taking Clause are property); *Goldberg v. Kelly*, 397 U.S. 254, 261, n.8 (1970) (due process is required to terminate welfare benefits). In the Hobbs Act context, property has been defined as "any valuable right considered as a source or element of wealth." *United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021 (1970).

[16] Class member clinics and patients have common law entitlements to the benefit of their business relations with one another and with suppliers and landlords; clinic employees have a common law entitlement to continued employment. *See* Restatement (Second) of Torts § 766, note d; § 766B, note c (1989). Respondents have extorted these property rights. *See* JA-66-71 ¶ 98.

[17] Respondents distort cases they claim support them. *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958), which they say "squarely held" that "obtaining" means "taking," is based on robbery, not extortion. Both *Nedley* and *People v. Squillante*, 185 N.Y.S.2d 357 (Sup. Ct. 1959), were decided *after* the Hobbs Act was enacted; they reveal nothing about what Congress had in mind when it passed the Act. *People v. Ryan*, 232 N.Y. 234, 235 (1921), discussed property only in *dicta*, noting that extorting *or* gaining property would suffice. *See also, People v. Wisch*, 296 N.Y.S. 2d 882 (Sup. Ct. 1969) (finding extortion where nothing was "received"). *United States v. Enmons*, 410 U.S. 396 (1973), dealt with the labor exemption and said nothing about whether property must be "received" to be deemed extorted. In twenty years, no court has adopted Respondents' reading of *Enmons*. *See United States v. Cerilli*, 603 F.2d 415, 419 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980) (warning against application of *Enmons* outside labor context). Further, Respondents "obtain" both Petitioners' patients, whom they take to "fake" clinics, JA-40, 42-43, and Petitioners' agreement not to perform abortions.

that the extorter receive anything. *United States v. Green*, 350 U.S. 415, 420 (1956). Instead, the crime focuses on loss to the victim. *E.g., United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *United States v. Lance*, 536 F.2d 1065, 1068 (5th Cir. 1976); *United States v. Santoni*, 585 F.2d 667, 673 (4th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979).[18] The "obtaining property" requirement cannot be bifurcated without overturning forty-five years of Hobbs Act jurisprudence. If Respondents' interpretation were correct, intangible property such as the rights to vote, assemble and speak in a union setting and to make business decisions free of coercion, which cannot be "received" by another person, would be exempt from Hobbs Act protection. Case law uniformly holds to the contrary.[19]

---

[18] Ironically, Terry attempts to distinguish between extortion and what he calls "coercion" but then directs the Court to numerous states in which the offenses are combined into a single crime. *E.g.*, Colo. Rev. Stat. Ann. § 18-3-207 (West 1990); Fla. Stat. Ann. § 836.05 (West 1976); Mass. Gen. Laws Ann. ch. 265, § 25 (West 1990); Mich. Comp. Laws Ann. § 750.213 (West 1990). *See also* James Lindgren, *More Blacknail Ink: A Critique of Blacknail, Inc., Epstein's Theory of Blacknail*, 16 Conn. L. Rev. 909, 916-18 (1984) (citing extortion cases where nothing was "received"). Petitioners have alleged predicate acts of extortion in at least Colorado, Florida, Massachusetts, and Michigan, and those allegations alone satisfy the pattern of racketeering activity requirement. 18 U.S.C. §§ 1961(1) and (5). *See also United States v. Nardello*, 393 U.S. 286 (1969) (rejecting formalistic distinction between extortion and coercion under Travel Act; victim's silence was extorted).

[19] "Property" subject to the Hobbs Act includes the right to make a business decision free from outside pressure, *United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986); *Santoni*, 585 F.2d at 673; *Tropiano*, 418 F.2d at 1075-76 (2d Cir. 1969); the rights to nominate, vote, assemble, and speak in a union setting, *United States v. Local 560*, 780 F.2d 267, 281-82 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986); *United States v. Debs*, 949 F.2d 199, 201 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 2945 (1992); interests in business accounts and unrealized profits, *United States v. Nadaline*, 471 F.2d 340, 344 (5th Cir.), *cert. denied*, 411 U.S. 951 (1973); goodwill and customer revenues, *United States v. Zemek*, 634 F.2d 1159, 1173-74 (9th Cir.), *cert. denied*, 450 U.S. 916 (1981); and the right to make personal and business decisions about life insur-

2. Respondents Used Force, Violence and Fear

Respondents say that they do not use violence, but they ignore the host of violent acts listed in the Complaint and RICO Case Statement.[20] *See* p. 15 *infra*. Alternatively, they contend that "not a single reported decision suggests that the pursuit of social, moral or political goals through pressure tactics...constitutes federal criminal extortion." Terry at 42. In fact, ideological extremists who commit extortion, including Respondents' co-conspirators, have been prosecuted successfully under the Hobbs Act despite the causes they espouse; ideology has never provided an exemption to the crime. *E.g.*, JA-161; *United States v. Lewis*, 797 F.2d 358 (7th Cir. 1986) (defendant convicted although he claimed to be exposing corruption); *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983) (abortion opponent who kidnaped doctor violated Hobbs Act); *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975) (conviction despite religious purpose); *United States v. Mitchell*, 463 F.2d 187 (8th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973) (job developer for the Congress of Racial Equality who threatened store owner violated Hobbs Act).

B. Many Predicate Acts Are Encompassed by the Complaint

Even if Respondents' Hobbs Act extortion argument were correct, the Complaint and RICO Case Statement allege numerous additional predicate acts.[21] Hobbs Act extortion is an

---

ance, *United States v. Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985), *cert. denied*, 475 U.S. 1024 (1986). *See also People ex rel. Short v. Warden of City Prison*, 130 N.Y.S. 698, 700-01 (App. Div. 1911) (right to work is property under New York extortion law).

[20] Virtually every court that requires a RICO case statement considers it an extension of the pleading, like an amendment to the complaint. *E.g., McLaughlin v. Anderson*, 962 F.2d 187, 189 (2d Cir. 1992); *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 n.3 (1st Cir. 1991). *See also* Murphy at 20-21 n.16.

[21] Contrary to Respondents' arguments, federal pleading rules do not require legal conclusions or facts, but only allegations sufficient to state a claim. Fed. R. Civ. P. 8(a); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A complaint must be sustained if relief could be granted "under any set of facts that could be

overarching RICO predicate, embracing virtually all of Respondents' crimes, but the same allegations state RICO claims based on other predicates as well, including arson, kidnaping and extortion under state law; violation of 18 U.S.C. § 659 (1976) (taking property from interstate shipments); violations of the Travel Act, 18 U.S.C. § 1952(a) (Supp. 1993); and physical violence to persons or property under § 1951.[22] Only two predicate acts are needed to prove a pattern of racketeering activity. Even if Hobbs Act extortion is ignored, numerous predicate acts are stated in the allegations here.

III. RICO ACCOMMODATES THE FIRST AMENDMENT

A. The Complaint Addresses Criminal Conduct, Not Speech

Respondents argue that Petitioners attack "all pro-life activists." Fortunately, not all anti-abortion activists are terrorists;[23] the Complaint is directed at only a small but

---

proved *consistent* with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (emphasis supplied). It need only contain allegations necessary for recovery on *any* legal theory, even a theory that was not suggested or intended by the pleader. *See* 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 1216 at 159 (1990). *See also* n.22 *infra*.

[22] *E.g.*, Arson is pled, *inter alia*, at JA-49, ¶¶ 40, 161-64, 166, 169, 171-72, 189, 195-06; kidnaping at JA-161; § 659 violations at JA-57-60; physical violence at JA-49 ¶ 40, -50 ¶¶ 42, 44, -67 ¶¶ 98(d) and (e), 99, 120, 136, 140, 142, 143, 160-66, 169, 171, 174, 183, 189, 190, 192, 195, 196; and violations of the Travel Act at JA-135-36, 139, 142-43, 158. As for state law extortion, see n.18 *supra*. Since the RICO Case Statement was filed, murder and attempted murder have occurred. Scheidler argues that the murder is "unrelated" to Respondents, but Dr. Gunn's "wanted" poster was prepared and circulated by Operation Rescue, and the murder was carried out by a group led by co-conspirator John Burt. *See* P.Br. at 5 n.3 and JA-50, 165. Terry ignores the record when he says the Respondents are not tied to arson. *See* Pet. A-3 n.5. Under *Hishon*, the facts of Dr. Gunn's murder (and the attempt on the life of Dr. George Tiller) are consistent with the pleadings. If additional pleading were needed, leave should be "freely given" to amend to state alternative theories of recovery. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

[23] The Complaint does not attack groups whose methods are peaceful. A comparison of the multitude of anti-abortion groups that filed amicus briefs in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), with the *amicus*

notorious radical fringe,[24] whose conduct the court below termed "reprehensible" and violent. Pet. A-15, 17, 33. Even the district court found the Complaint directed at "violence, force, threat, or harassment," not "legal, non-violent activity used by the Defendants to express their opposition to abortion." R.248 at 4.

Violence has characterized PLAN since its inception. PLAN designated 1985 "a year of pain and fear," JA-49, ¶ 40; dynamite has been PLAN's logo since 1986, J-49, ¶ 40. PLAN urges its people not to wait for legislative change, but to use "direct action" by "any and all means available," J-53; J. Scheidler, *Closed: 99 Ways to Stop Abortion* (1985) at 17.[25] It has said "no clinic will be spared."[26] PLAN tries to cast its forcible invasions of clinics as peaceful sit-ins, but they stand in marked contrast to the *non-violent* sit-ins of Dr. Martin Luther King, Jr., who refrained from violence even when provoked. PLAN's "sit-ins" involve physical attacks on patients, doctors and staff; damage to clinic property and equipment; and forcible obstruction of clinic entrances. As even the court below said, to suggest that the First Amendment protects such actions is "audacity." Pet. A-15.

---

briefs filed in support of Respondents here is telling.

[24] These are the "organized and violent mobs across the country" to which Justice Stevens referred in *Bray*, 113 S.Ct. at 780 (*dissenting*) (1993).

[25] Respondents suggest that *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), which held that petitioning to secure government action does not violate the Sherman Act, protects them. The Seventh Circuit flatly rejected this argument because Respondents expressly abandoned governmental change; their primary objective is *not* to influence legislation. Pet. A-6, 15. *Cf.* Houser at App. 2a. (*Amicus* Houser, a former Operation Rescue leader, finally abandoned "rescue" activity when "opportunities for...legislation seemed available.")

[26] Even protected speech is admissible to show criminal intent. *Wisconsin v. Mitchell*, 113 S.Ct. 2194, 2201 (1993).

1. *Claiborne* Governs the First Amendment Issues Here

The parties and *amici* agree that *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), governs the First Amendment issues here. *Claiborne* carefully detailed the constitutional limits on laws that incidentally regulate social protest. It stressed that the presence of speech together with violence does not end judicial inquiry. *Id.* at 912. "The First Amendment does not protect violence. Certainly violence has no sanctuary in the First Amendment the use of weapons, gunpowder and gasoline may not constitutionally masquerade under the guise of 'advocacy'." *Id.* at 916.[27] *Wisconsin v. Mitchell*, 113 S.Ct. at 2199, reaffirmed that conduct that causes harm distinct from its communicative impact receives no protection. *See also Alexander*, 113 S.Ct. at 2774 (RICO does not criminalize protected speech); ACLU at 11.

Claiborne explained that while liability may not be based on mere membership in a group in which some commit violence, a person is liable for unlawful conduct that he or she authorizes or incites. 458 U.S. at 920 n.56.[28] *Accord* ACLU at 8, 15. While words of disapproval and social ostracism cannot support liability, *id.* at 921, an inflammatory "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force." *Id.* at 923.[29] *See also*

---

[27] To avoid punishing protected speech, *Claiborne*, 458 U.S. at 933-34, required evidence that the parties agreed to, engaged in or incited unlawful conduct. In a jury case, this is accomplished by instructions explaining that damages may be awarded *only* for consequences of unlawful conduct, not for protected speech. *E.g., Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1348-49 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989). Respondents' request for "heightened pleading standards" ignores these rules. *See also Leatherman v. Tarrant County Narcotics*, 113 S.Ct. 1160 (1993).

[28] PETA's "guilt by association" argument, at 28-29, is further answered by *Reves*, 113 S.Ct. 1163, which guarantees that parties who neither commit predicate acts nor manage the enterprise cannot be liable due only to their association with an enterprise. *See also* ACLU at 6, 12. Respondents here are the hardcore leaders and managers of PLAN, not peripheral associates.

[29] In an effort to fit PLAN's violence into the NAACP mold, Murphy claims

Cox v. Louisiana, 379 U.S. 559, 563 (1965) ("A man may be punished for encouraging the commission of a crime.").

2. Civil Disobedience is Not Protected Speech

Disregarding *Claiborne*, PETA suggests that if, in addition to "protected acts," a protester decides to "use another form of civil disobedience," that "other" conduct is also immune, *i.e.*, that protected speech gives lawless acts a free ride. Whether RICO applies to civil disobedience depends on what illegal acts the protester uses; unlawful conduct -- like that charged here -- may be punished.[30] *See Claiborne*, 458 U.S. at 933.

The violence and force at issue here are not "peripheral" or "incidental" to the enterprise. PLAN's chief tactics are forcible invasions and blockades.[31] If the Respondents did no more than annoy, ostracize or vilify their victims, we would not have filed this case. If they did not use threats, force and violence, there would be no predicate acts. But Respondents show no respect for the nation's laws and no tolerance for citizens who disagree with them. Whether they call it "civil disobedience" or

---

that the NAACP used violence to enforce the boycott in *Claiborne*, and Houser says that Evers, a defendant in that case, incited violence. This is completely incorrect; the *absence* of a connection between these defendants and the violence led the Court to find them not liable. *Claiborne*, 458 U.S. at 906. *Compare* Evers' speech *with* that of co-conspirator John Burt, whose organization of the March 10, 1993, demonstration in Pensacola immediately preceded the murder of Dr. David Gunn at the hand of one of Burt's demonstrators.

[30] Surprisingly, the PETA *amici* at 11 admit that their tactics are "remarkably similar" to the predicate acts here. If they mean throwing paint on fur store patrons, sinking whaling ships or destroying lab equipment, these acts are unprotected. The fact that they picket or carry banners while committing violence does not immunize the violence. *See Claiborne*, 458 U.S. at 912. The AMA's brief at 2-4, 8, 22, also details violence against medical professionals that receives no First Amendment shield.

[31] Respondents suggest that the predicate acts are "non-violent speech." Yet the RICO Case Statement, JA-87-197, lists hundreds of acts where little or no protected speech is involved. While Migliorino claims that "most" of her conduct is protected, she conveniently ignores the acts listed in JA-118-126 -- forcible invasions, destruction of equipment and threats of physical force. PLAN's blockades, like its sit-ins, are forceful and violent.

terrorism, such conduct receives no protection.

B. Congress Has Resolved Respondents' Policy Arguments

By definition, "civil disobedience" is unlawful conduct. "Chilling" unlawful conduct is not a First Amendment issue.[32] Yet Respondents and PETA argue that even if the First Amendment does not protect it, this Court should reach out and exclude violent protest from RICO on policy grounds.

The *amicus* brief submitted in support of Petitioners by twenty-six civic and civil rights groups spanning religious, racial, ethnic, and other lines (the "Civic Groups") addresses the problem caused by the "worldwide resurgence of political, racial, religious, and ethnic terrorism" and points out the "very real possibility" that force and violence of this sort could be used against any of us. Civic Groups at 1, 6.[33] When a group -- for whatever reason -- conspires to use violence, there is no constitutional, legal or policy reason to encourage them.

---

[32] *Wisconsin v. Mitchell*, 113 S.Ct. 2194, considered whether penalty-enhancements under hate-crimes laws chill protected expression and concluded that any such chill was attenuated, speculative and of no First Amendment concern. Any chill here, if there were one, would be of illegal conduct, not speech; there is even less cause for concern here than in *Wisconsin*. *See also Alexander*, 113 S.Ct. at 2171 (rejecting argument that forfeiture penalty chills protected speech).

[33] We need only pick up the daily paper to see the harm that terrorists, zealously believing in their cause, inflict on individuals, businesses and nations' economies. As this brief is being written, not only have two doctors who performed abortions been shot or killed, but the World Trade Center trial is underway; Salman Rushdie's publisher has been shot; it has been revealed that the lives of the people of Waco, Texas, "who did not say they were believers" were in jeopardy; and killings continue in Northern Ireland. True believers no doubt think that their ends justify their means and, to borrow Terry's phrase, that they need answer only to "higher laws." But when Respondents' *amici* call for "tolerance" of violence undertaken for a cause, they ask too much. (Ironically, those who ask for "tolerance" of their violence are typically wholehearted in their *intolerance* of those who follow different religious practices, hold different views or have a different opinion about what is best for the world.) Even the ACLU, at 17, an ardent supporter of dissent in many forms, recognizes the need for "a strong remedial response."

This Complaint is not brought to "crush" the anti-abortion movement, or "eliminate" opposing views, as Respondents say. Petitioners respect the peaceable speech of those who oppose their views. The Complaint seeks relief only from the terrorist tactics of a radical fringe that would deny doctors, women, business owners, and others the rights to practice medicine, make reproductive choices and engage in lawful business.[34] While tirelessly focusing on motive, Respondents refuse to draw a line between violent and non-violent conduct, but it is an essential distinction for determining RICO's application to their acts. RICO does not criminalize non-violent acts of protest that Respondents and their *amici* cite, such as teaching slaves to read, violating parade ordinances, burning draft cards, attempting to register to vote, chasing animals away from hunters, putting notes in pockets of fur coats, urging a consumer boycott or displaying signs without a permit. *See* 18 U.S.C. § 1961(1). Peaceful acts of protest, carried out without threats, cannot be predicate acts.[35] By contrast, threats and acts of violence may be RICO predicates. RICO's legislative history shows that its list of predicate acts was subject to intense First Amendment scrutiny.[36] While meeting First Amendment concerns, Congress

---

[34] Respondents argue that applying RICO to non-economic enterprises or predicate acts will stifle "social dissent," but the ACLU at 3 correctly points out what a "poor proxy" economic motive is for protecting civil liberties. Although an opponent of RICO in general, the ACLU has never endorsed Respondents' view: "[T]he fact that defendants are motivated by politics rather than money is no more relevant than it would be if a group of white supremacists claimed a First Amendment right to intimidate blacks seeking to vote." *Id.* at 2-3.

[35] Civil disobedience functions by calling public attention to the justice of a cause, not by imposing the protester's will on others through threats and force. *See* PETA at 7-8. The acts of Dr. King (violating parade ordinance) and Dr. Benjamin Spock (burning draft cards) are far more effective in accomplishing social change than are PLAN's acts of terrorism. To a large degree, Respondents' methods have brought embarrassment, not positive public concern, to their movement. Yet, PLAN and the PETA *amici* insist on keeping the arrow of violence in their quiver.

[36] An early version of RICO would have rendered any act "creating danger of violence" a predicate act. *See* Scheidler at 33. Had that bill been enacted,

deliberately included forcible and violent conduct -- tactics used by both PLAN and organized crime -- as RICO predicates. Congress has the authority under the Constitution to decide which non-speech offenses to criminalize, and in RICO it struck a careful balance, leaving a broad margin around protected speech. Remanding this case will not chill speech; it will not even chill *non-violent* civil disobedience. It can only chill terrorism.

IV. CONCLUSION

The decision of the Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

Of Counsel:

Lowell E. Sachnoff
Jack L. Block
Sachnoff & Weaver, Ltd.
30 South Wacker Drive
Chicago, Illinois 60606

Alan M. Pollack
Mitchell G. Mandell
Scott A. Sommer
Pollack & Greene
757 Third Avenue
New York, New York 10017

Fay Clayton
Counsel of Record
Susan Valentine
Judi A. Lamble
Robinson Curley & Clayton, P.C.
300 South Wacker Drive
Chicago, Illinois 60606

Counsel for Petitioners

Dated: November 1, 1993.

RICO might have encompassed non-violent protest by "creat[ing] danger of violence" from the protesters' opponents. But in response to the ACLU's vigorous testimony, *e.g.*, 116 Cong. Rec. 35,212-14 (1970), Congress deleted this broad language from the bill.